ED
JUL 2 2 2003

No. 02-1792

In The
Supreme Court of the United States

CARL E. JONES, KATHRYN L. JONES,
LARRY TREADWAY, KASSIE TREADWAY,
DAVID C. JONES, SYLVIA J. JONES,
JERRY PURCELL, MARGIE PURCELL,

Petitioners,

v.

BUFFALO TOWNSHIP,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Pennsylvania

MOTION FOR LEAVE TO FILE BRIEF AND MOTION FOR LEAVE TO FILE BRIEF *NUNC PRO TUNC* AND BRIEF OF *AMICUS CURIAE* PENNSYLVANIA LANDOWNERS ASSOCIATION IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Amicus Curiae Pennsylvania Landowners Association ("PLA") respectfully moves this Court for leave to file a brief in support of the Petition for a Writ of Certiorari in this case.

1. Counsel of record for PLA attempted to obtain consent of all parties in this case to file an *amicus curiae* brief by timely making a request to counsels of record.

2. Petitioners' counsel, William Claney Smith, Esquire has consented to the filing of PLA's *amicus curiae* brief.

3. Respondent's counsel, Lawrence Paul Lutz, Esquire will not consent to the filing of PLA's *amicus curiae* brief.

4. PLA has a strong interest in this case and believes it can aid the Court in its decision as set forth in the attached brief.

WHEREFORE, PLA respectfully requests that this Court grant its Motion for Leave to File an *Amicus Curiae* Brief in support of the Petition for Writ of Certiorari filed in this case.

Respectfully submitted,

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF *NUNC PRO TUNC*

Amicus Curiae Pennsylvania Landowners Association ("PLA") respectfully moves this Court for leave to file *nunc pro tunc* a brief in support of the Petition for a Writ of Certiorari in this case.

1. The Petition for Writ of Certiorari in the case at issue was placed on the docket on June 11, 2003.

2. Pursuant to Rule 37.2(a) of the Supreme Court's Rules, an *amicus curiae* brief must be filed within the time allotted for the filing of a brief in opposition or within thirty days after the case is placed on the docket. Supreme Court Rule 15.3.

3. The *amicus curiae* brief and the brief in opposition were required to be filed by July 14, 2003.

4. Counsel for PLA reviewed the United States Supreme Court's computerized docket sheet for the case at issue and mistakenly apprehended the date June 23, 2003 in brackets underneath the computer screen entitled "Docket for 02-1792" and erroneously determined that the Petition for Writ of Certiorari in this case was docketed on June 23, 2003. Thus, counsel for PLA believed that the *amicus curiae* brief was not due for filing until thirty days thereafter, or July 23, 2003.

5. As counsel for PLA was preparing to file the attached *amicus curiae* brief, counsel learned that the Petition for Writ of Certiorari was docketed on June 11, 2003.

6. Counsel for PLA respectfully prays that the *amicus curiae* will not be foreclosed from filing its brief as a result of misapprehension of the online docket sheet counsel consulted in this case.

WHEREFORE, counsel for PLA respectfully requests that that this Court grant its Motion for Leave to File an *Amicus Curiae* Brief *Nunc Pro Tunc*.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*[1]

Pennsylvania Landowners Association ("PLA") is a statewide, non-profit corporation and volunteer organization of individuals whose livelihoods are dependent on the use and development of privately owned land in the Commonwealth. PLA's objective is to advance the interests of private landowners, particularly those individuals who have limited resources in comparison to those of state, local and federal agencies and powerful, privately funded, non-governmental organizations which are frequently arrayed against landowners in matters involving environmental and land-use regulation affecting private property rights.

PLA is greatly concerned about the proliferation of involuntary rails-to-trails conversions and other legislative and regulatory initiatives which can indefinitely suspend, if not entirely destroy their members' reversionary interests in abandoned railroad rights-of-way property.

Smaller landowners don't have the resources to go to court and assert their constitutional rights. Simply stated, small landowners can be priced out of the takings and rails-to-trails litigation market and any confusion in that law exacerbates the difficulties encountered by small landowners whose property rights are affected by trail conversions.

Abandoned and active railroad rights-of-way criss-cross Pennsylvania and burden hundreds of thousands of

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[1] Pursuant to Rule 37.6 of the Rules of the Supreme Court of the United States, counsel for the *amicus curiae* states that counsel and the *amicus curiae* were the sole authors of the Brief. No person or entity, other than the *amicus curiae*, made any monetary contribution to the preparation or submission of this Brief.

acres of private land. A large percentage of these rights-of-way were operated and subsequently abandoned by Conrail in circumstances virtually identical to those involved in this case and in *Lucas v. Township of Bethel*, 319 F.3d 595 (3d Cir. 2002).

Pennsylvania is located within the jurisdiction of the Court of Appeals for the Third Circuit. PLA believes that the decision of the Supreme Court of Pennsylvania involved here, unless reversed, will cause irreconcilable confusion and present directly conflicting precedent to litigants in any court sitting in Pennsylvania in any litigation relating to the Rails-to-Trails Act.

SUMMARY OF ARGUMENT

The Pennsylvania Supreme Court in the case at issue has violated the Supremacy Clause by holding that a prospective recreational trail user seeking to use a former railroad right-of-way need not fully comply with federal regulations promulgated pursuant to the Rails-to-Trails Act, which holding is directly in conflict with a Third Circuit Court of Appeals' controlling decision requiring full compliance with the regulations before abandonment of the right-of-way and reversionary property interests are suspended, a question of federal law. The state court's decision will cause confusion and uncertainty both for entities seeking use of abandoned railroad rights-of-way under the federal Act and for underlying property owners with reversionary interests.

ARGUMENT

THE PETITION SHOULD BE GRANTED BECAUSE THE PENNSYLVANIA SUPREME COURT'S DECISION THAT PROPOSED INTERIM TRAIL USERS NEED NOT COMPLY WITH FEDERAL REGULATIONS IMPLEMENTING THE NATIONAL TRAILS SYSTEM ACT IS IN DIRECT CONFLICT WITH THE LAW OF THE THIRD CIRCUIT COURT OF APPEALS IN VIOLATION OF THE SUPREMACY CLAUSE

Congress enacted the National Trails System Act, 16 U.S.C. § 1241 *et seq.*, to permit, under carefully prescribed conditions, the interim use as recreational trails of certain rights-of-way formerly used by railroads, while preserving those rights-of-way for the railroads' possible future use (hereinafter, "Rails-to-Trails Act"). *Preseault v. I.C.C.*, 110 S. Ct. 914, 916 (1990). Under Section 8(d) of the Rails-to-Trails Act, 16 U.S.C. § 1247(d), certain entities such as a state, municipality, or private group may seek to use a railroad's right-of-way for interim trail use if that entity agrees to assume legal and financial responsibility for the right-of-way property. *Preseault*, 110 S. Ct. at 916. If the prescribed conditions are met and the interim trail use is approved, the underlying property owner's reversionary interests are destroyed and prevented from vesting immediately as they would in the majority of contexts. *Preseault*, 110 S. Ct. at 919.

The Interstate Commerce Commission ("ICC") originally was authorized to implement the Rails-to-Trails Act.[2]

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[2] The Surface Transportation Board ("STB") assumed the ICC's responsibilities to regulate railroads in 1996. 49 U.S.C. § 701. This Brief will refer to the ICC, rather than the STB, because the ICC was the relevant entity in the case before the Court.

The ICC's regulations promulgated under the Rails-to-Trails Act require that a prospective interim trail user, in order to preserve the railroad right-of-way for recreational trail use, file with the ICC formal documentation describing the proposed site, indicating the user's willingness to assume full responsibility for management, legal liability, and taxes regarding the site, and acknowledging the user's continuing obligation to meet the aforementioned responsibilities. 49 C.F.R. § 1152.29(a).

In *Lucas*, the United States Court of Appeals for the Third Circuit determined that a proposed interim trail user must file the documents required in the ICC's regulations under the Rails-to-Trails Act to prevent lawful abandonment and reversion of the right-of-way to the owners of the underlying property. 319 F.3d at 604. The facts of the case in *Lucas* are remarkably similar to those in the case at issue. In both cases, Conrail notified the ICC on October 31, 1985, that it intended to abandon a railroad right-of-way pursuant to Section 308(c) of the Regional Rail Reorganization Act, 45 U.S.C. § 748(c).[3] *Id.* at 599; *Buffalo Township v. Jones*, 813 A.2d 659, 661 (Pa. 2002). In both cases, Conrail filed an application with the ICC for approval of abandonment under Section 308. *Id.* In both cases, the ICC issued an unconditional authorization to Conrail to abandon the right-of-way under Section 308. *Id.* In both cases, rail service had been long discontinued by Conrail and provisions had been made for the removal of all railroad track and appurtenant materials. *Lucas*, 319 F.3d at 599; *Buffalo Township*, 813 A.2d at 662.

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[3] Section 308 applies specifically to abandonment applications filed by Conrail prior to November 1, 1985 and provides a streamlined procedure for Conrail to abandon its unprofitable railroad rights-of-way. 45 U.S.C. § 748.

Moreover, in both the case at issue and in *Lucas*, after the ICC authorized abandonment of the railroad rights-of-way, Conrail sold the rights-of-way interests to entities wishing to use them for recreational trail purposes. *Lucas*, 319 F.3d at 599; *Buffalo Township*, 813 A.2d at 662. In both cases, those entities failed utterly to comply with the ICC regulations promulgated pursuant to the Rails-to-Trails Act. 49 C.F.R. § 1152.29(a). Indeed in the case at issue, a request for interim trail use was filed, but later withdrawn. *Buffalo Township*, 813 A.2d at 662. In *Lucas*, no documentation whatsoever was filed with the ICC to even qualify under the Rails-to-Trails Act to request a suspension of abandonment of the railroad right-of-way. 319 F.3d at 604.

Despite the similarities between the two cases, however, the Pennsylvania Supreme Court made a ruling in complete conflict with the Third Circuit's decision regarding the need for proposed interim trail users to comply with the ICC regulations under the Rails-to-Trails Act. The Court of Appeals in *Lucas* decided that the entity proposing recreational trail use in that case had not invoked the jurisdiction of the ICC because it had not complied with the applicable regulations in failing, among other things, to file the required documents. 319 F.3d at 604.

In stark contrast, the Pennsylvania Supreme Court, in *Buffalo Township*, held that the proposed trail user in that case did not need to comply fully with the requirements in the regulations under the Rails-to-Trails Act. 813 A.2d at 653. The court determined that, because the ICC's involvement in trail conversions is "merely procedural," a proposed trail user is not required to file an application with the ICC to suspend abandonment of the railroad right-of-way and reversion of the interest of the underlying property owner. *Id.* at 654. The Pennsylvania Supreme

Court made its decision despite having had its attention specifically directed to the Third Circuit's contrary decision in *Lucas*.

By holding that federal regulations promulgated pursuant to a federal statute need not be complied with in contradiction of a controlling federal appeals court decision, the Pennsylvania Supreme Court has violated the Supremacy Clause of the United States Constitution, U.S. Const., Art. VI, cl. 2. *See also Key v. Wise*, 102 S. Ct. 682, 685 (1981). The impact of this violation of the Supremacy Clause will be to create confusion in the law regarding compliance with the federal regulations under the Rails-to-Trails Act. Proposed trail users that examine Pennsylvania law will be informed that they need not abide by the ICC regulations, while those that examine the law of the federal appellate court sitting in Pennsylvania will be told that they must comply fully with those same regulations. Certainly, a proposed trail user will "shop" for a Pennsylvania court if possible because the user's compliance burden is significantly lessened in that court. Finally, individuals holding reversionary interests in railroad rights-of-way cannot know with any certainty when or if their reversionary property interests will vest.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be granted, the Pennsylvania Supreme Court's holding that federal regulations under the Rails-to-Trails Act need not be complied with in contradiction of the decision of the Third Circuit Court of Appeals should be reversed as violative of the Supremacy Clause,

and all other relief based upon Petitioners' arguments should be granted.

Respectfully submitted,

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